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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41572

ALLIED TUBE & CONDUIT CORPORATION--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: March 10, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in Jones Truck Lines, Inc. v. Allied Tube & Conduit Corporation, Case No. 93 C 4089. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Allied Tube & Conduit Corporation (Allied or petitioner). Jones seeks undercharges of $43,877.20 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 430 shipments of iron and steel fittings, steel channels, barbed wire, steel rod pipe hangers, and insulated copper wire between July 18, 1988, and May 8, 1989. The shipments were less-than-truckload (LTL) movements transported from Allied's facilities in Franklin Park, IL, Houston, TX, and Harvey, IL, to points in 19 states.[2] By order

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Petitioner points out that 13 of the subject shipments are described in the freight bills issued by Jones as shipments transported from the Thermodynamics facility in Broken Arrow, OK, to points in six states. None of the freight bills issued for these shipments identifies petitioner as the shipper, consignee, or payor of the freight charges, and petitioner asserts that it has not been named on the bills of lading furnished by Jones for

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dated March 13, 1995, the district court stayed the proceeding and directed petitioner to submit issues of contract carriage, unreasonable practice, and rate reasonableness to the ICC for resolution.

Pursuant to the court order, petitioner, on May 8, 1995, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served June 13, 1995, the ICC issued a procedural schedule for submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on August 11, 1995. Respondent filed a reply statement on September 13, 1995. Petitioner filed a rebuttal statement on October 3, 1995.

Petitioner, in its opening statement, asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to transportation agreements. Allied further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Allied supports its argument with an affidavit from Michael Bange of Champion Transportation Services, a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments representative sample "balance due" bills issued by respondent, which reflect originally issued freight bill data as well as "corrected" balance due amounts (Exhibits A, B, and C). It also includes executed agreements dated April 13, 1987, and October 26, 1987, bearing the signatures of a representative of Jones and Allied entitled "Transportation Agreement" (Exhibits F and G). The agreements indicate that transportation services are to be performed by Jones under its contract carrier Permit No. MC-111231 Sub 382 (Exhibit E). The April 13th agreement provides for the application of a 50% discount off class rates for outbound shipments from the Franklin Park facility to the carrier's direct service points other than those located in Texas, a 55% discount off class rates for outbound shipments from Franklin Park to direct service points located in Texas, and a 42% discount off class rates for inbound collect shipments from direct service points to the Franklin Park facility, subject to a minimum charge of $35.00 (Exhibit F). The October 26th agreement provides for a 45% discount off class rates for outbound movements from Allied's Houston facility to the carrier's direct service points, subject to a minimum charge of $36.00 (Exhibit G).

Mr. Bange states that respondent's balance due bills indicate that all of the original freight bills issued by Jones for outbound Houston movements applied the 45% discount, subject

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these shipments. Petitioner argues that balance due bills for these shipments, which including interest, represent aggregate claims totaling $1,782.54, should be eliminated from this proceeding. Jones has failed to respond to petitioner's assertions and has provided no explanation as to how shipments from the Thermodynamic facility are related to, or the responsibility of, petitioner. As Jones has failed to establish the legitimacy of its claims against petitioner with respect to these 13 shipments, we find that these 13 claims against petitioner should be dismissed.

to the $36 minimum charge, called for in the October 26th transportation agreement. With respect to the original freight bills issued by Jones for movements to and from the Franklin Park facility, Mr. Bange asserts that, with minor variations, the discounts applied, subject to the $35 minimum charge, conformed to the discounts called for in the April 13th transportation agreement. To explain the minor variations from the April 13th agreement, Mr. Bange states that it was customary in contract carrier relationships for the carrier to agree orally to amendments to existing agreements so as to bring rates in line with existing market levels or to facilitate the movement of traffic to points for which contract rates had not been established.[3]

Jones argues that the shipments at issue moved in common carriage, not contract. It refers to language contained in the transportation agreements that their "sole purpose [was] to provide reductions and allowances. Provisions of common carriage apply to all shipments." With respect to petitioner's claim that section 2(e) of the NRA governs this matter, respondent contests the applicability of that provision on statutory and constitutional grounds.[4]

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[3] In this regard, Mr. Bange asserts that the Franklin Park discounts were applied by Jones to the two shipments that originated at petitioner's nearby Harvey facility.

[4] Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifshultz Fast Freight Corporation, 63 F.3d 621 (7th Cir, 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's

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DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[5]

It is undisputed that Jones no longer transports property.[6] Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains two 1987 transportation agreements signed by the parties confirming the existence of negotiated discount rates. In addition, petitioner has submitted representative sample documents indicating that the original freight bills issued by respondent consistently applied rates that reflect the stated discounts as called for in the 1987 transportation agreements executed on April 13, 1987, and October 26, 1987. We find this evidence sufficient to satisfy the

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[4](...continued)
"separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

[5] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exemption to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[6] Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

written evidence requirement. E. A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E. A. Miller).[7]

In this case, the evidence is substantial that the rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier confirm the rates set forth in the 1987 agreements and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands

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[7] Jones, at p. 13-14 of its statement filed September 13, 1995, argues that freight bills do not constitute written evidence. Respondent contends that under section 2(e)(1)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, Jones concedes at page 11 of its statement that, if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. The evidence establishes that discounted rates were offered to Allied by Jones; that Allied tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Allied for transporting the shipments at issue in this proceeding.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on March 24, 1997.

3. A copy of this decision will be mailed to:

The Honorable John F. Grady
United States District Court for the

Northern District of Illinois
Eastern Division
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, IL 60604

Re: Case No. 93 C 4089

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary